

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
DONALD SIEGEL, OFFICER OF	:	
CHARISMA BUSINESS SUPPLY CO., INC.	:	DETERMINATION
AND CHARISMA LEGAL SUPPLY CO., INC.	:	DTA NOS. 807082
	:	AND 807083
for Revisions of Determinations or for Refunds	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1982	:	
through May 31, 1982.	:	

Petitioner, Donald Siegel, officer of Charisma Business Supply Co., Inc. and Charisma Legal Supply Co., Inc., 2128 Oliver Way, Merrick, New York 11566, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1982 through May 31, 1982.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on June 11, 1990 at 1:30 P.M., and was scheduled for continuance on September 18, 1990. Petitioner appeared at the June 11, 1990 hearing by Peter R. Newman, Esq. The Division of Taxation appeared at such hearing by William F. Collins, Esq. (Kevin Cahill, Esq., of counsel). On August 18, 1990, petitioner executed powers of attorney appointing and authorizing one Morris P. Silver, C.P.A., as substitute representative in place of Mr. Newman. The hearing scheduled for September 18, 1990 was adjourned and the matter was held in abeyance pending various meetings between petitioner's new representative and the Division's representative. Thereafter, by a confirming letter dated July 7, 1992, the parties agreed that a continuation of the hearing need not be scheduled, and that therecord could be closed upon submission of additional documents by petitioner and briefs. Petitioner's additional documents and initial brief were to be submitted by August 6, 1992. The Division's brief was due by September 4, 1992, with petitioner's reply brief due by September 18, 1992. No additional documents or

briefs were submitted.

ISSUES

I. Whether petitioner, Donald Siegel, was a person under a duty to collect and remit sales and use taxes on behalf of two corporations known as Charisma Business Supply Co., Inc. and Charisma Legal Supply Co., Inc., pursuant to Tax Law §§ 1133(a) and 1131(1), during the period March 1, 1982 through May 31, 1982.

II. Whether, if so, the dollar amounts of tax due are the amounts shown on two notices of determination issued to petitioner rather than the amounts shown as due on sales and use tax returns late-filed by the corporations.

III. Whether petitioner has advanced any grounds sufficient to warrant abatement of penalties imposed.

FINDINGS OF FACT

On September 15, 1987, the Division of Taxation ("Division") issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Donald Siegel as an officer of Charisma Business Supply Co., Inc. ("Business"). This notice pertained to the sales tax quarterly period spanning March 1, 1982 through May 31, 1982, and assessed Mr. Siegel for additional sales tax allegedly owed by Business in the amount of \$29,856.43, plus penalty and interest. On the same September 15, 1987 date, a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to Mr. Siegel as an officer of Charisma Legal Supply Co., Inc. ("Legal"). This notice assessed Mr. Siegel for additional tax allegedly due from Legal for the sales tax quarterly period spanning March 1, 1982 through May 31, 1982 in the amount of \$12,300.07, plus penalty and interest.

Each of the corporate entities named above was engaged in the sale of business machines, equipment, and supplies, and also was involved in brokering printing jobs for various law firms.

The record does not specify when the corporate entities commenced doing business. However, during at least the early part of 1982, and apparently prior thereto, the businesses

were encountering financial difficulties. On May 5, 1982 an assignment for the benefit of creditors was filed on behalf of each corporate entity. The assignment documents, dated May 4, 1982, were executed by petitioner, Donald A. Siegel, as president of Business and of Legal. An original assignee, one Robert Rubinger, was named, and was later replaced by one John R. Marvin as successor assignee.

As a part of the assignment for the benefit of creditors, an auction of the assets of the businesses was conducted by Martin Fein and Co., Inc. as auctioneers. The gross auction proceeds amounted to \$29,027.65 for Business and \$12,775.00 for Legal. However, the auction proceeds were allegedly not turned over to the original assignee (Robert Rubinger), but rather were dissipated by the auctioneer or auctioneering firm. In turn, an action to compel payment of the proceeds of the auction was commenced by the assignee. The auctioneering firm thereafter filed for protection under the bankruptcy code, and this status has apparently continued to date.

According to testimony by the successor assignee (Mr. Marvin) accounts receivable were also collected on behalf of Business in the amount of approximately \$43,000.00, and Legal in the amount of approximately \$35,500.00. These amounts are being held in certificates of deposit pending action in the bankruptcy and assignment proceedings.

Petitioner Donald Siegel did not appear and give testimony at the hearing. However, petitioner presented one Allen Zuness as a witness. Mr. Zuness commenced employment with the two corporate entities in or about December of 1980. Mr. Zuness testified that for some 12 years prior to his association with the corporate entities here, he had been an office manager for various law firms. In the course of that employment he met Mr. Siegel and was offered a position with the two corporate entities. Mr. Zuness explained that he loaned some \$30,000.00 to the businesses when he first became an employee. Shortly thereafter, he also guaranteed a bank loan to the businesses in the amount of \$100,000.00. He testified that his intent in joining these businesses in this fashion was that eventually he would acquire a part-ownership interest in the businesses.

Mr. Zuness received an annual salary from the businesses in the amount of

approximately \$60,000.00. By contrast, he testified that Donald Siegel's salary was initially in the range of \$200,000.00, but was thereafter reduced by some \$30,000.00 annually at the suggestion of Mr. Zuness and in light of the businesses' financial difficulties.

Mr. Zuness described Donald Siegel as the president and sole shareholder of both corporations who came to the businesses' location nearly every day to see the general operation of the businesses. Mr. Siegel was apparently most directly involved with sales, and had hired Mr. Zuness as an inside office administrator. Mr. Zuness described his primary role as taking care of the daily office administrative functions.

Both Mr. Zuness and Mr. Siegel were authorized signatories to the corporate checking accounts. Mr. Zuness signed checks, including checks in payment of sales tax, and also signed tax returns, including sales tax returns. He described his signings as occurring either at the direction of Mr. Siegel or taking place when Mr. Siegel was not physically present at the businesses. From time to time, Mr. Zuness utilized the title of vice-president, although he testified that he was never formally appointed to such position and that he used the title merely for appearance purposes in dealing with other persons. He described himself as under the supervision of Mr. Siegel, and noted that any questions regarding business matters, such as priority in payment of bills including, specifically, taxes would be directed to Mr. Siegel.

Mr. Zuness described the two corporate entities as being run essentially as one company. There was a total of approximately 18 employees, hired and fired by Mr. Siegel. Mr. Zuness specifically testified that he would have had to ask Mr. Siegel before hiring or firing anyone. It appears, although it is not entirely clear, that Mr. Zuness never hired or fired any employees of either corporation.

At some point in 1981, shortly after becoming involved with the companies, Mr. Zuness determined that certain obligations, including sales tax payments, were delinquent. He advised Mr. Siegel to this effect, suggesting that Mr. Siegel should go to the Division and attempt to work out a payment schedule. According to Mr. Zuness, Mr. Siegel approved of the idea and a meeting was scheduled. However, Mr. Siegel did not appear at or accompany Mr. Zuness to the

meeting. From documents in evidence, it appears that a payment arrangement was agreed to, at least for delinquent taxes owed for quarterly periods during 1981. It also appears that some payments were made pursuant to this agreement, as evidenced by a check to the Division signed by Mr. Zuness in an amount equal to that amount shown as the monthly payment due under the payment arrangement.

Mr. Zuness testified that the businesses eventually defaulted on the \$100,000.00 loan and that, pursuant to his guarantee, he was required to pay some \$30,000.00 on such loan, with Mr. Siegel paying the other \$70,000.00. At or about the same time, Mr. Zuness also paid one half of a \$12,000.00 Internal Revenue Service withholding tax assessment. Mr. Zuness never received repayment of his own \$30,000.00 initial loan to the businesses nor has he recovered any of the amounts he paid on the defaulted bank loan or withholding tax assessment.

Introduced in evidence was a letter dated March 30, 1989, written by petitioner's former representative (Mr. Newman), and accompanied by sales tax returns (Forms ST-100) for the sales tax quarterly period in question. These returns are dated March 23, 1989 and bear a signature appearing to be that of Donald Siegel. Mr. Newman's letter indicates that the returns were being filed after the conduct of a conciliation conference and pursuant to leave granted by the conciliation conferee. The return filed for Business indicates a sales tax liability of \$5,431.04, while that filed for Legal indicates a sales tax liability of \$1,242.41. Mr. Newman's letter claims the delay in filing such returns post conference was occasioned by petitioner's accountant's need to review old records in order to compute accurate returns.

Also offered in evidence in connection with the returns described above were responding letters dated January 31, 1990 and April 25, 1990, respectively, from Vera R. Johnson, Esq., the Division's then-representative in this matter. Ms. Johnson's January 31, 1990 letter references receipt of the returns in question, noting that "[i]f your client remits payment for the taxes due as noted [on such returns], I will arrange to cancel [the notices at issue herein]." Ms. Johnson's April 25, 1990 letter references the prior January 31, 1990 letter, noting specifically that "payment of tax, penalty and interest will be needed to cancel [the notices at

issue herein]. [Ms. Johnson's January 3, 1990] letter inadvertently refers to payment of taxes due only."

There is no evidence in the record that any payments have been received by the Division with respect to either of the sales tax returns described above or with respect to the notices of determination at issue herein, from either Mr. Siegel or from the proceeds of the auction and/or collection of accounts receivable. Further, there is no evidence that any of the gross proceeds of the auction of assets has been recovered (via Supreme Court or bankruptcy actions) from the auctioneering firm of Martin Fein and Co., Inc.

CONCLUSIONS OF LAW

A. Tax Law § 1131(1) defines "persons required to collect tax" to include:

"[A]ny officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership or any employee of an individual proprietorship who as such officer, director or employee is under a duty to act for such corporation, partnership or individual proprietorship in complying with any requirement of [Article 28]"

Tax Law § 1133(a), in turn, imposes liability as follows:

"every person required to collect any tax imposed by [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under [Article 28]."

B. Matter of Autex Corp. (Tax Appeals Tribunal, November 23, 1988) summarizes the factors which are considered relevant in determining whether an individual is responsible for the sales and use taxes due from a corporation, as follows:

"The determination that an individual is a responsible officer depends on the particular facts of each case (Stacy v. State, 82 Misc 2d 181, 183). Factors stated by the Division's regulations are whether the person is authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]).

"Other indicia developed by the case law are: the authorization to hire or fire employees, the derivation of substantial income from the corporation or stock ownership (Blodnick v. State Tax Commn., 124 AD2d 437); the individual's possible shared status as an officer, director or stockholder (Cohen v. State Tax Commn., 128 AD2d 1022, 1023); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation, the duties and functions as outlined in the certificate of incorporation and the bylaws, the preparation and filing of sales tax forms and returns (Vogel v. NY Tax & Finance, 98 Misc 2d 222, 225-226); and the payment, including the authorization to write checks on behalf of the corporation, of other creditors other than the State of New York and the United States

(Chevlowe v. Koerner, 98 Misc 2d 388, 391)" (Matter of Autex Corp., supra).

C. Summarized as a general proposition, the issue to be resolved is whether petitioner had or could have had the ability, in fact as well as in law, to control the affairs of the corporations so as to be considered a person under a duty to collect and remit the unpaid taxes in question (Matter of Constantino, Tax Appeals Tribunal, September 27, 1990; Matter of Chin, Tax Appeals Tribunal, December 20, 1990).

D. In this case, there is more than ample evidence to support a conclusion that petitioner was a person under a duty to collect and remit taxes due on behalf of the two corporations. Petitioner's name appears on numerous documents as president of the corporations, and what appears to be petitioner's signature appears on numerous documents including, but not limited to, the sales tax returns filed, albeit late, for the period in question. Petitioner was described in testimony by a former employee as being the sole shareholder and president of the corporations. Such testimony, from a witness called by petitioner's representative, revealed that petitioner came to the businesses nearly every day, was in overall charge of the businesses, hired and fired employees, received a sizeable salary from the businesses, directed priority of payment of liabilities, including taxes, and was specifically aware of unpaid sales tax liabilities. In contrast, there is essentially no evidence, either in testimony or by documents, which would tend to diminish petitioner's involvement or absolve him of liability. Petitioner did not appear or give testimony on his own behalf. Finally, any attempt on petitioner's behalf to hint that Mr. Zuness may have been a responsible person vis-a-vis payment of taxes for the corporations, even if true, in no way diminishes or overcomes petitioner's own responsibility (see, Matter of LaPenna, Tax Appeals Tribunal, March 14, 1991). Accordingly, petitioner was properly assessed for the unpaid sales tax liabilities of the two corporations for the period at issue.

E. Turning to the dollar amounts of the assessments, petitioner's representatives have, to some degree, questioned whether the amounts due should be those amounts shown on the late filed returns as opposed to the amounts assessed on the notices of determination. In this regard, petitioner makes reference to the Division's correspondence pertaining to the returns (letters of

January 31, 1990 and April 25, 1990; see Finding of Fact "14"). However, these communications not only appear to represent offers in the nature of settlement but also, clearly, make payment of tax (as shown on the returns), plus penalty and interest due, a prerequisite to cancelling the notices in question. Since there is no evidence that any payments have been made, the question of acceptance of the terms of the settlement is not reached and is rendered moot. Further, given no evidence to refute or reduce the amounts shown on the notices leaves such amounts to be sustained.

F. Petitioner has advanced no argument or evidence which would serve to support reduction or abatement of penalties herein properly imposed. Accordingly, penalties assessed are sustained.

G. The petitions of Donald Siegel, officer of Charisma Business Supply Co., Inc. and Charisma Legal Supply Co., Inc., are denied, and the notices of determination and demands for payment of sales and use taxes due dated September 15, 1987 are sustained.

DATED: Troy, New York
March 11, 1993

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE